

## **Probate Code (Title 18-A MRSA), Select Guardianship Laws**

### **§5-204. Court appointment of guardian of minor; conditions for appointment**

The court may appoint a guardian or coguardians for an unmarried minor if:

(a). All parental rights of custody have been terminated or suspended by circumstance or prior court order;

(b). Each living parent whose parental rights and responsibilities have not been terminated or the person who is the legal custodian of the unmarried minor consents to the guardianship and the court finds that the consent creates a condition that is in the best interest of the child;

(c). The person or persons whose consent is required under subsection (b) do not consent, but the court finds by clear and convincing evidence that the person or persons have failed to respond to proper notice or a living situation has been created that is at least temporarily intolerable for the child even though the living situation does not rise to the level of jeopardy required for the final termination of parental rights, and that the proposed guardian will provide a living situation that is in the best interest of the child; or

(d). The person or persons whose consent is required under subsection (b) do not consent, but the court finds by a preponderance of the evidence that there is a de facto guardian and a demonstrated lack of consistent participation by the nonconsenting parent or legal custodian of the unmarried minor. The court may appoint the de facto guardian as guardian if the appointment is in the best interest of the child.

A guardian appointed by will as provided in section 5-202 whose appointment has not been prevented or nullified under section 5-203 has priority over any guardian who may be appointed by the court but the court may proceed with an appointment upon a finding that the testamentary guardian has failed to accept the testamentary appointment within 30 days after notice of the guardianship proceeding.

If a proceeding is brought under subsection (c) or subsection (d), the nonconsenting parent or legal custodian is entitled to court-appointed legal counsel if indigent. In a contested action, the court may also appoint counsel for any indigent de facto guardian, guardian or petitioner when a parent or legal custodian has counsel.

If a proceeding is brought under subsection (b), subsection (c) or subsection (d), the court may order a parent to pay child support in accordance with Title 19-A, Part 3. When the Department of Health and Human Services provides child support enforcement services, the Commissioner of Health and Human Services may designate employees of the department who are not attorneys to represent the department in court if a hearing is held. The commissioner shall ensure that appropriate training is provided to all employees who are designated to represent the department under this paragraph.

If the court appoints a limited guardian, the court shall specify the duties and powers of the guardian, as required in section 5-105, and the parental rights and responsibilities retained by the parent of the minor.

## **§5-209. Powers and duties of guardian of minor**

A guardian of a minor has the powers and responsibilities of a parent who has not been deprived of custody of a minor and unemancipated child, except that a guardian is not legally obligated to provide from the guardian's own funds for the ward and is not liable to 3rd persons by reason of the parental relationship for acts of the ward. In particular, and without qualifying the foregoing, a guardian has the following powers and duties.

(a). The guardian must take reasonable care of the ward's personal effects and commence protective proceedings if necessary to protect other property of the ward.

(b). The guardian may receive money payable for the support of the ward to the ward's parent, guardian or custodian under the terms of any statutory benefit or insurance system, or any private contract, devise, trust, conservatorship or custodianship. The guardian also may receive money or property of the ward paid or delivered by virtue of section 5-103. Any sums so received must be applied to the ward's current needs for support, care and education. The guardian must exercise due care to conserve any excess for the ward's future needs unless a conservator has been appointed for the estate of the ward, in which case excess must be paid over at least annually to the conservator. Sums so received by the guardian may not be used for compensation for the guardian's services except as approved by order of court or as determined by a duly appointed conservator other than the guardian. If there is no conservator, the excess funds must be turned over to the minor when the minor attains majority. A guardian may institute proceedings to compel the performance by any person of a duty to support the ward or to pay sums for the welfare of the ward.

(c). The guardian is empowered to facilitate the ward's education, social or other activities and to give or withhold consents or approvals related to medical, health or other professional care, counsel, treatment or service for the ward. The guardian is empowered to withhold or withdraw life-sustaining treatment as set forth in section 5-312, subsection (a), paragraph (3). A guardian is not liable by reason of such giving or withholding of consent for injury to the ward resulting from the negligence or acts of 3rd persons unless it would have been illegal for a parent to have so given or withheld consent. A guardian may consent to the marriage or adoption of the ward.

(d). A guardian must report the condition of the ward and the ward's estate that has been subject to that guardian's possession or control, as ordered by court on petition of any person interested in the minor's welfare or as required by court rule. If the guardian has received any funds pursuant to section 5-103, the guardian shall account to the court and the minor regarding how the funds were expended prior to the termination of that person's responsibilities as guardian.

#### **§5-210. Termination of appointment of guardian; general**

A guardian's authority and responsibility terminates upon the death, resignation or removal of the guardian or upon the minor's death, adoption, marriage or attainment of majority, but termination does not affect his liability for prior acts, nor his obligation to account for funds and assets of his ward. Resignation of a guardian does not terminate the guardianship until it has been approved by the court. A testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding.

#### **§5-212. Resignation or removal proceedings**

(a). Any person interested in the welfare of a ward, or the ward, if 14 or more years of age, may petition for removal of a guardian on the ground that removal would be in the best interest of the ward. A guardian may petition for permission to resign. A petition for removal or for permission to resign may, but need not, include a request for appointment of a successor guardian.

(b). After notice and hearing on a petition for removal or for permission to resign, the court may terminate the guardianship and make any further order that may be appropriate.

(c). If, at any time in the proceeding, the court determines that the interests of the ward are, or may be, inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is 14 or more years of age.

(d). The court may not terminate the guardianship in the absence of the guardian's consent unless the court finds by a preponderance of the evidence that the termination is in the best interest of the ward. The petitioner has the burden of showing by a preponderance of the evidence that termination of the guardianship is in the best interest of the ward. If the court does not terminate the guardianship, the court may dismiss subsequent petitions for termination of the guardianship unless there has been a substantial change of circumstances.

(e). In a contested action, the court may appoint counsel for any indigent guardian or petitioner.

## **Child Welfare Laws (Title 22 MRSA), Selected Provisions**

### **§4038-C. Permanency guardian**

As part of the permanency plan, the District Court may appoint a person or persons as guardian of a minor, to be known as a permanency guardian. "Permanency guardian," when used in this section and in section 4038-D and Title 20-A, section 12572, means the person or persons appointed as the permanency guardian.

**1. Criteria.** The District Court may appoint a person to be a permanency guardian only if the court finds that the prospective permanency guardian:

- A. Has the ability to provide a safe home for the child;
- B. Has a close emotional bond with the child and that the child has a close emotional bond with the prospective permanency guardian;
- C. Is willing and able to make an informed, long-term commitment to the child; and
- D. Has the skills to care for the child and to obtain needed information about and assistance with any special needs of the child.

**2. Powers and duties of permanency guardian.** A permanency guardian has all of the powers and duties of a guardian of a minor pursuant to Title 18-A, section 5-209.

**3. Parental and relative contact.** A parent, grandparent or sibling of a child subject to a permanency guardianship or to a proceeding to establish a permanency guardianship may petition the court to determine rights of contact as provided in subsection 6. If the District Court determines that it is in the best interest of the child, it may order that the parent, grandparent or sibling of the child has a reasonable right of contact with the child and may specify the type, frequency, duration and conditions of that contact.

**4. Child support.** The parents shall pay the permanency guardian child support. Title 19-A, section 1652 and Title 19-A, chapter 63 govern the award of child support to the permanency guardian. The child support obligation may be enforced pursuant to Title 19-A, chapter 65 or 67.

If there is an existing child support order or obligation regarding the child, and if the District Court fails to make a child support order at the time of appointing a permanency guardian, the permanency guardian becomes the obligee under the existing support order or obligation. A copy of the order appointing the permanency guardian is sufficient proof of the permanency guardian's status as obligee.

**5. Jurisdiction over permanency guardian.** The District Court has exclusive jurisdiction to appoint or remove a permanency guardian and to establish any rights of contact between a child and a parent, grandparent or sibling.

**6. Proceedings to terminate permanency guardianship or to determine rights of contact.** Proceedings to terminate permanency guardianship or to determine rights of contact are governed by the following.

A. Any party to the child protective proceeding may petition to terminate a permanency guardianship and any parent, grandparent or sibling of the child may petition the court to establish rights of contact with the child, except that a person having once petitioned unsuccessfully to terminate a permanency guardianship or to establish rights of contact may not bring a new petition to terminate the permanency guardianship or to establish rights of contact within 12 months after the end of the previous proceeding, and then only if the petitioner alleges and proves that there has been a substantial change of circumstances regarding the child's welfare.

B. Notice of a petition under paragraph A must be given in the manner provided for by Rule 4 of the Maine Rules of Civil Procedure to all parties to the child protective case and to the permanency guardian.

C. The permanency guardianship may be terminated only if the petitioner proves by a preponderance of the evidence that the termination is in the best interest of the child.

**7. Effect on inheritance rights and public benefits.** The appointment of a permanency guardian does not affect the inheritance rights between a child and the child's parent or parents.

The appointment of a permanency guardian may not affect the child's entitlement to benefits due that child from any 3rd person, agency or state or the United States. Except as required by federal law or regulation, the permanency guardian's resources and income are not counted in determining eligibility for any public benefit to which the child may be entitled.

The permanency guardianship does not affect the rights and benefits that a Native American derives from descent from a member of a federally recognized Indian tribe.

**8. Resignation, death or incapacity of permanency guardian.** Resignation of a permanency guardian does not terminate the guardianship until it has been approved by the court. If a permanency guardian resigns, dies or becomes incapacitated, the District Court shall hold a judicial review and a permanency planning hearing at the earliest practicable time.

**9. Preference.** The District Court shall give preference for placement and permanency guardianship to a person nominated by a deceased permanency guardian in a valid will or by an incapacitated permanency guardian in a valid power of attorney, unless the District Court finds that the placement or permanency guardianship is not in the child's best interest.

**10. Limitation.** The District Court does not have authority to provide a guardianship subsidy for permanency guardianship under section 4038-D.

**11. Application to pending cases.** The District Court may appoint a permanency guardian in a proceeding pending on September 17, 2005 or in a proceeding commenced on or after September 17, 2005.

**12. Appointments terminate; later appointments.** Unless the District Court has scheduled a judicial review or orders otherwise, the court's appointments of the guardian ad litem and attorneys for parents and guardians terminate, and the attorneys and guardian ad litem have no further responsibilities to their clients or the court upon appointment of a permanency guardian pursuant to this section. If a party files a motion for judicial review

when no judicial review is required pursuant to section 4038, subsection 1-A, or if a party files a petition pursuant to subsection 6 to terminate a permanency guardianship or determine rights of contact, the court shall appoint a guardian ad litem and attorneys for indigent parents and custodians, including permanency guardians, as required by section 4005.

#### **§4038-D. Guardianship subsidy**

**1. Establishment of program; use of federal funds.** There is established in the department the Guardianship Subsidy Program, referred to in this section as "the program." For the purposes of this section, the department is authorized to use funds that are appropriated for child welfare services and funds provided under the United States Social Security Act, Titles IV-B and IV-E, or under any waiver that the department receives pursuant to those Titles.

**2. Eligibility for guardianship subsidy payments.** Subject to rules adopted to implement this section, the department may provide subsidies for a special needs child who is placed in a permanency guardianship or in a similar status by a Native American tribe, when reasonable but unsuccessful efforts have been made to place the child without guardianship subsidies and if the child would not be placed in a permanency guardianship without the assistance of the program.

**3. Definition of "special needs child."** For purposes of this section, "special needs child" means a child who:

- A. Has a physical, mental or emotional handicap that makes placement difficult;
- B. Has a medical condition that makes placement difficult;
- C. Is a member of a sibling group that includes at least one member who is difficult to place;
- D. Is difficult to place because of age or race;
- E. Has been a victim of physical, emotional or sexual abuse or neglect that places the child at risk for future emotional difficulties; or
- F. Has in the family background factors such as severe mental illness, substance abuse, genetic or medical conditions or illnesses that place the child at risk for future problems.

**4. Amount of guardianship subsidy.** The amount of a guardianship subsidy is determined according to this subsection.

- A. The amount may vary depending upon the resources of the permanency guardian, the special needs of the child and the availability of other resources.
- B. The amount may not exceed the total cost of caring for the child if the child were to remain in the care or custody of the department, without regard to the source of the funds.
- C. Except as provided in paragraph D, assistance may be provided only for special needs.

D. Subject to rules adopted by the department, the amount may include up to \$400 for reimbursement for legal expenses, including attorney's fees, incurred by the permanency guardian to complete the permanency guardianship in Indian tribal court cases.

**5. Duration of guardianship subsidy.** A guardianship subsidy may be provided for a period of time based on the special needs of a child. The subsidy may continue until the termination of the permanency guardianship or until the permanency guardian is no longer caring for the child, at which time the guardianship subsidy ceases. If the child has need of educational benefits or has a physical, mental or emotional handicap, the guardianship subsidy may continue until the child has attained 21 years of age if the child, the parents and the department agree that the need for care and support exists.

**6. Administration of program.** Applications for the program may be submitted by a prospective permanency guardian. A written agreement between the permanency guardian entering into the program and the department must precede the order creating the permanency guardianship, except that an application may be filed subsequent to the creation of the permanency guardianship if there were facts relevant to the child's eligibility that were not presented at the time of placement or if the child was eligible for participation in the program at the time of placement and the permanency guardian was not apprised of the program.

**7. Annual review required.** If the subsidy continues for more than one year, the need for the subsidy must be reviewed annually. The subsidy continues regardless of the state in which the permanency guardian resides, or the state to which the permanency guardian moves, if the permanency guardian continues to be responsible for the child.

**8. Death of permanency guardian.** Upon the death of all persons serving as permanency guardian, the subsidy may be transferred to a new legal guardian as long as the child continues to be eligible for the guardianship subsidy pursuant to the terms of the most recent agreement with the permanency guardian. The department shall enter into a new agreement with the new legal guardian.

**9. Adoption of rules.** The department shall adopt rules for the program consistent with this section. Rules adopted pursuant to this subsection are routine technical rules pursuant to Title 5, chapter 375, subchapter 2-A.

**10. Permanency guardian's eligibility for public benefits.** Except as required by federal law or regulation, the guardianship subsidy may not be counted as resources or income in the determination of the permanency guardian's eligibility for any public benefit.

**11. Application to pending cases.** The department may provide a guardianship subsidy pursuant to this section to a child who is the subject of a child protection proceeding pending on September 17, 2005 or to a child who is the subject of a child protection proceeding commenced on or after September 17, 2005.

## **Termination of Parental Rights (Title 22 MRSA), Selected Provisions**

### **§4055. Grounds for termination**

- 1. Grounds.** The court may order termination of parental rights if:
  - A. One of the following conditions has been met:
    - (1) Custody has been removed from the parent under:
      - (a) Section 4035 or 4038;
      - (b) Title 19-A, section 1502 or 1653;
      - (c) Section 3792 prior to the effective date of this chapter; or
      - (d) Title 15, section 3314, subsection 1, paragraph C-1; or
    - (2) The petition has been filed as part of an adoption proceeding in Title 18-A, article IX; and
  - B. Either:
    - (1) The parent consents to the termination. Consent shall be written and voluntarily and knowingly executed in court before a judge. The judge shall explain the effects of a termination order; or
    - (2) The court finds, based on clear and convincing evidence, that:
      - (a) Termination is in the best interest of the child; and
      - (b) Either:
        - (i) The parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child's needs;
        - (ii) The parent has been unwilling or unable to take responsibility for the child within a time which is reasonably calculated to meet the child's needs;
        - (iii) The child has been abandoned; or
        - (iv) The parent has failed to make a good faith effort to rehabilitate and reunify with the child pursuant to section 4041.

**1-A. Rebuttable presumption.** The court may presume that the parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child's needs if:

- A. The parent has acted toward a child in a manner that is heinous or abhorrent to society or has failed to protect a child in a manner that is heinous or abhorrent to society, without regard to the intent of the parent;
- B. The victim of any of the following crimes was a child for whom the parent was responsible or the victim was a child who was a member of a household lived in or frequented by the parent and the parent has been convicted of:
  - (1) Murder;



- (2) Felony murder;
- (3) Manslaughter;
- (4) Aiding or soliciting suicide;
- (5) Aggravated assault;
- (6) Rape;
- (7) Gross sexual misconduct or gross sexual assault;
- (8) Sexual abuse of minors;
- (9) Incest;
- (10) Kidnapping;
- (11) Promotion of prostitution; or
- (12) A comparable crime in another jurisdiction;

C. The child has been placed in the legal custody or care of the department, the parent has a chronic substance abuse problem, and the parent's prognosis indicates that the child will not be able to return to the custody of the parent within a reasonable period of time, considering the child's age and the need for a permanent home. The fact that a parent has been unable to provide safe care of a child for a period of 9 months due to substance abuse constitutes a chronic substance abuse problem;

D. The child has been placed in the legal custody or care of the department, the court has previously terminated parental rights to another child who is a member of the same family and the parent continues to lack the ability or willingness to show the court that the parent has sought services that would rehabilitate the parent or the parent can not show evidence that an additional period of services would result in reunification in a time reasonably calculated to meet the needs of the child and the child's need for a permanent home; or

E. The child has been placed in the legal custody or care of the department for at least 9 months, and the parents have been offered or received services to correct the situation but have refused or have made no significant effort to correct the situation.

**2. Primary considerations.** In deciding to terminate parental rights, the court shall consider the best interest of the child, the needs of the child, including the child's age, the child's attachments to relevant persons, periods of attachments and separation, the child's ability to integrate into a substitute placement or back into the parent's home and the child's physical and emotional needs.

**3. Wishes of child.** The court shall consider, but is not bound by, the wishes of a child 12 years of age or older in making an order under this section.